85-1804

Supreme Court, U.S.
FILED
APR 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October 1985 TERM

DANNY CLARK CROSS,

PETITIONER,

VS.

GENERAL MOTORS CORPORATION, ET AL.,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANNY CLARK CROSS, ESQ.
#7 Beverly Place
St. Louis, Mo. 63112
(314) 367 3743
(312) 580 5646

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine of Res Judicata should be invoked to bar a 42 U.S.C. § 1981 claim previously dismissed without prejudice?

2. Whether the doctrine of Res Judicata should be applied to a 42 U.S.C. § 1985(3) claim under the unique circumstances of the present case?

3. Whether the doctrine of Res Judicata is available to bar a civil rights cause of action in circumstances where neither the purpose of the doctrine is served nor the elements of the doctrine exist?

TABLE OF CONTENTS

Question Presented For Review

Table Of Cases And Other Authorities.i-ii

Citation Of Case As Reported Below....iii

Jurisdictional Statement.....iv

Applicable Statutes Involved.....v-vii

Parties To The Proceeding Below...viii-ix

Statement Of The Case.....x-xi

Argument.....1-14

The Court Below Has Erroneously Applied Res Judicata § 1981.....3-11

The Court Below Has Erroneously Applied Res Judicata § 1985(3).....12-14

Conclusion.....15

Appendix.....A1-A17

TABLE OF CASES AND OTHER AUTHORITIES

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed. 2d 308 (1980). 4,11

Beltz Travel Service v. International Air Transportation Assn. 620 F2d 1360 (9th Cir. 1980). 13,14

Burnett v. Grattan, 468 U.S. _____, 104 S.Ct. 2924, 82 L.Ed. 2d 36 (1980). 8

Cromwell v. County of Sac, 94 U.S. 351, 24 L. Ed. 630 (1897). 11

Cross v. General Motors Corp., et al. 778 F.2d 468 (8th Cir. 1985). . . .13

Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed. 2d 338 (1971). 14

Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed. 2d 295 (1975). 4

Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed. 2d 210 (1979). 3,11

Runyon v. McCrary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed. 2d 415 (1976). 5

United States v. Socony Vaccum Oil Co., 310 U.S. 150, 60 S.Ct. 811 84 L.Ed. 1142 (1940). 13

Table Of Cases And Other Authorities
(Cont.)

Statutes:

42 U.S.C. § 1981 . . .3,4,5,7,8,9,10,12

42 U.S.C. § 1985(3). 12

Rules:

Federal Rule Of Civil Procedure,
Rule 37(b). 8

CITATION OF CASE AS REPORTED BELOW

The opinion of the Court Of Appeals For The Eighth Circuit here being reviewed is reported at 778 F. 2d 468 (8th Cir. 1985) and said opinion is reproduced in the Appendix herein, infra, at pp. A1-A10. The panel order of the Court Of Appeals denying your petitioner's Petition for Rehearing and Rehearing En Banc is not reported, and said order is reproduced in the Appendix herein, infra, at p. A11.

The order of the District Court granting Summary Judgement to the Respondants is not reported, and said order is reproduced in the Appendix herein, infra, at pp. A12-A13.

JURISDICTIONAL STATEMENT

This Petition for Certiorari seeks review of the opinion and judgement entered by the Eighth Circuit Court of Appeals, which affirmed the order of the District Court for the Eastern Division of Missouri granting Summary Judgement to the Respondents.

The opinion and judgement were entered November 27th, 1985. A petition for rehearing was served and filed on December 11th, 1985. The Court's order, denying your petitioner's Petition for Rehearing and Rehearing En Banc was entered January 16th, 1986.

The statutory provisions believed by your petitioner to confer jurisdiction upon this Court are 28 U.S.C. §§ 1254(1) and 2101(c).

APPLICABLE STATUTES WHICH CASE INVOLVES

42 U.S.C. § 1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kinds, and to no other."

42 U.S.C. § 1985(3)

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the

laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injuried in his person or property, or

deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

PARTIES TO THE PROCEEDINGS BELOW

The caption of this case which contains the names of all parties to the proceedings below before the district court and the court of appeals whose judgement on the above stated questions petitioner seeks review is as follows:
Danny Clark Cross, plaintiff, versus,
General Motors Corporation and Agents;
Robert Lemmon, as agent and individually;
Jerry Shermer, as agent and individually;
Donald Weedmon, as agent and individually;
Jim Tisodo, as agent and individually;
Mark Woodham, as agent and individually;
Vaughn Smith, as agent and individually;
Jerry Williams, as agent and individually;
H.E. Knight, as agent and individually;
Dr. Shanahan, as agent and individually;
Charles Seabough, as agent and individually;
J. H. Vincent, as agent and individually;
Jay Boren, as agent and individually;

Charles Hagan, as agent and individually;

Jack Seifert, as agent and individually;

Mike Wisdom, as agent and individually;

Dwight Dugan, as agent and individually;

D. E. McGowan, as agent and individually;

Ray Stipes, as agent and individually;

Bob Brookhouse, as agent and individually;

and All Unknown Agents and Individuals,

defendants.

STATEMENT OF THE CASE

On April 25th, 1984, your petitioner, Danny Clark Cross, in accordance with the Federal Rules Of Civil Procedure, and pursuant to Mo. Rev. Stat. §§ 516.120 and 516.230 and the decision of the Court Of Appeals for the Eighth Circuit,[1] refiled his civil rights causes of action under 42 U.S.C. §§ 1981 and 1985(3) against the respondents herein, which causes of action had been previously dismissed without prejudice. The respondents herein moved for and was granted a motion for summary judgement,[2] by the district court. The district court, in its order, granted summary judgement for reason that your petitioner had refiled his 1981 and 1985(3) claims over a year since the date of the

1. Cross v. General Motors Corp., 721 F.2d 1152, cert. denied, 466 U.S. 980, 104 S.Ct. 2364, L.Ed. 2d 836 (1984).

2. The Order of the district court is not reported but is reproduced in appendix at p. A12.

original dismissal without prejudice. The district court went on to indicate the asserted 1985(3) claim further fails because the respondents constitute a single person so there can be no basis for a conspiracy and the acts complained of were arguably within the scope of employment.[3]

The court of appeals affirmed the district court on the ground that the district court had dismissed for failure to state a claim under 1981 and 1985(3) and the causes of action asserted by your petitioner under 1981 and 1985(3) are precluded in accordance with the doctrine of res judicata.

---

3. It is particularily noteworthy that as to the issue of the acts complained of by your petitioner, which acts range from physical batterings to racial slurs committed by respondents, the court of appeal when it first reviewed these acts to detemine whether a conspiracy was possible, decided that they were acts that are "alleged acts arguably...within the scope of employment," infra, n. 1 at 1156, but in consideration of the present appeal it held that such acts "would be outside the scope of the agents' employment." Cross v. General Motors, 778 F 2d at 469.

The jurisdiction of federal district court, determined by the statutes providing the causes of action asserted by your petitioner, is grounded in Title 28 of the United States Code of 1948 as subsequently amended Sections 1331 and 1343.

ARGUMENT

Your petitoner submits that there exist special and important reasons to issue the requested Writ Of Certiorari. This is a civil rights case, but it is also a case of human suffering, the allegations are a sad commentary on our society. As a nation it was decided that human indignities and the incidents of slavery were outlawed. No longer would our country permit a man to be degraded and unconscionably mistreated and abused merely because he was not of white skin. The civil rights laws are for the protection of everyone and not solely for minorities. Hence, it is important to society in general that the civil rights laws are enforced.

Further, cases of this Court cited herein appear to be disregarded by the Court of Appeals regarding application of res judicata. The conclusion by the Court of Appeals that res judicata prevents and bars this civil rights action is tantamount to a determination that a federal question has been decided, and as such, this conclusion and the decision that produce it conflicts with applicable decisions of this Court.

Hence, this Court should exercise its discretion in favor of issuance of the requested Writ of Certiorari.

THE COURT BELOW HAS ERRONEOUSLY APPLIED RES JUDICATA § 1981

There are at least two reasons the preclusive effects of res judicata should not be applied to the present lawsuit barring it from a § 1981 trial on the merits. First, the equities are on the side of the petitioner. Secondly, the elements governing the application of res judicata are not present in this case here on review regarding § 1981.

A review of the purpose of the doctrine of res judicata and the purpose of the civil rights acts reveals that equity favors your petitioner. The doctrine of res judicata is traditionally invoked to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Montana v. United States, 440 U.S. 147 .

153, 99 S.Ct. 970, 59 L.Ed. 2d 210 (1979), these basic reasons were again recognized in Allen v. McCurry, 449 U.S. 90 101 S.Ct. 411, 66 L. Ed. 2d 308 (1980). None of these traditional and basic reasons to apply the doctrine exist in the case here on review.

In contrast, the purposes served by the Civil Rights Acts, clearly indicate that the case here on review has the equities of the litigation heavily perponderating in favor of your petitioner. The Civil Rights Acts were passed to disencumber our society of racial mistreatment, to do away with the vestiges and badges of slavary. In particular, section 1981, as made clear in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 44 L.Ed. 2d 295, 95 S.Ct. 1716 (1975), affords a federal remedy against discrimination in private employment on the basis of race.

This stated purpose of section 1981 was reaffirmed in Runyon v McCrary, 427 U.S. 160, 49 L.Ed. 2d 415, 96 S.Ct. 2586 (1976).

The allegations of the complaint[4] reveal that the employment contexts in which your petitioner worked was riddled with the type of racial disgust the civil rights laws were enacted to prevent and when violations do occur these laws exists to redress the wrong. Section 1981, consistent with the purpose and intent of the civil rights laws, prohibits race discrimination in private employment. It can be no doubt that if the allegations of the complaint are proven liability will be determined and found.

---

4. It was succinctly characterized by the Court of Appeals that your petitioner allegations involved racially motivated batterings, fasification of petitioner's employment record, racial epithets, work without compensation, improper layoffs, intentional and improper manipulation of medical records,

Allegations of the type here presented clearly are the type associated with slavery and its badges. The intentional battering of a black individual by a white supervisor solely because someone is black appears to be a master slave circumstance where the master fears no accounting for his behavior. The other allegations are of a similar nature. Yet, your petitioner never struck a physical blow in response to the abuse.[5]

---

forced to work while injured under threat of layoff, increasing workload while not increasing the workload of whites, and other allegations. Ceratinaly it is allegations such as these, if proven, the civil rights laws are meant to redress. Slavery, of course, involved physical abuse, forced work without compensation and other abuses, mental and physical.

5. It need not be emphasized strongly that the occurrences violative of the statute transpired, in part, during the aftermath of Dr. Martin Luther King, Jr.'s death. Your petitioner sought to have King's birthday recognized as a holiday at GMC, hence, your petitioner carried a petition for workers to sign in the hope that this would become a reality, and it was because of your petitioner's advocacy, at least in part, that many of the abuses were not return in kind. The abuse was probably to deter others from advocacy.

Notwithstanding this backdrop, the Court of Appeals has applied the doctrine of res judicata to dispose of your petitioners section 1981 cause of action. Nowhere in the decision does the court indicate that the equities favor invocation of the doctrine in favor of the respondents. Your petitioner's 1981 claim went before a jury[6] and in every complaint filed by your petitoner, a section 1981 claim is asserted. The court of appeals decision does not indicate that your petitioner has abondoned or otherwise given-up his section 1981 claim. In deed, it would be ludicrous to suggest that your petitioner abandoned his only cause of action held by the lower court as a sufficient claim to go before a jury.[7]

As an advocate of dreams of and for King, your petitioner could not return the abuses perpestrated against him by GMC officals. In deed, your petitioner keep the faith in hopes that one day his cause will be heard.

The bring of the 1981 claim before a jury was no small matter. The preparation of such a claim, as mentioned in Burnett v. Grattan, 468 U.S. _____, 104 S. Ct. 2924, 82 L. Ed. 2d 36 (1980), is considerable. The Court observed,

> "Litigating a civil rights claims requires considerable preparation. An injured person must recognized the constitutional dimensions of his injury. He must obtain counsel or prepare to proceed pro se. He must conduct investigation . . . .pay a substantial filing fee. . . .He must be prepared to withstand various responses, such as a motion to dismiss. . . ."

Your petitioner had the burden of an immense pretrial preparation. The task was made difficult for reasons that many incidents that lay the foundation of

---

6. The dismissal without prejudice which involved disempaneling the jury was based on an alleged failure by your petitioner to abide by a discovery order, hence, sanction of dismissal was imposed pursuant to FRCP 37(b), and yet no order of discovery was identified as the order that your petitioner failed to comply with. Moreover, a willful failure is the requirement and in this vain the Court Of Appeals noted that your petitioner had "substantially complied."

and for the allegations involved the collection of witnesses scattered throughout St. Louis and other places such as Troy, Mo., Festus, Mo., O'Fallon, Mo., Chicago, Ill., and St. Louis County.[8] Many of these witnesses, once located, had to be reacquaint with the facts about which they had personal knowledge but due to the many years that had passed, their memories were less than sharp. It took immense preparation.

As regard the many pretrial motions filed by GMC they too were considered by the court and denied. Hence, your petitioner's 1981 claim went before a jury.

---

7. Among the various pretrial tests to detemine the sufficiency of your petitioner's 1981 claim were a motion for partial summary judgement and motion for judgement on the pleadings. These motions were denied by order of the lower court, said order reproduce in appendix pp. A14-A17.

8. Additionally, it took considerable expense to locate these key eyewitnesses. The mere fact that many of them observed incidents as long ago as ten years past presented difficulty in the preparatory stage of the litigation.

Despite the fact that your petitioner has asserted a separate 1981 claim in every pleading filed, despite the fact the the lower court found that your petitioner sufficiently alleged a 1981 claim, despite the fact that the equities perponderate in favor of your petitioner and despite the fact that the civil right laws serve a purpose for society pre-eminent to the purpose for invocating a preclusive doctrine, the Court of Appeals has applied the doctrine of res judicata to deny your petitioner his forum before a jury, has denied your petitioner his day in court, which the rules of procedure and the constitution guarantee.

Secondly, yet another important consideration that reveals the error of applying the res judicata doctrine to the instant litigation is the absence of the elements governing its application.

To apply the doctrine of res judicata

there must have been a final judgement, that final judgement must be on the merits, and the issue litigated must be the same as that for which the final judgement was obtained. Cromwell v. County of Sac, 94 U.S. 351, 24 L.Ed. 630 (1897), reaffirmed in Montana v. United States, supra, and Allen v. McCurry, supra.

Hence, as to your petitioner's 1981 claim against respondent General Motors Corporation, res judicata is inapplicable for reasons that there is no final judgement on the merits that precludes subsequent litigation. It therefore is error to apply the doctrine under the circumstances here presented.

THE COURT BELOW HAS ERRONEOUSLY APPLIED RES JUDICATA § 1985(3)

Your petitioner readily concedes that the Court of Appeals position regarding the individuals to this lawsuit weights strongly against petitioner.[9] However, your petitioner submits that it was error to adopt the same position to shield GMC from the asserted § 1985(3) claim.

Unlike 42 U.S.C. § 1981, not requiring an allegation of conspiracy, § 1985(3) requires that a conspiracy be alleged and proved before any recovery can be obtained. The statute itself provides that an injured party "may have an action. . . .against any one . . . .of the conspirators."

---

9. However, your petition believes that no final order was entered on the dismissal without prejudice against the individuals, hence, there has been no judgement on the merits.

Your petitioner's position here is simple. GMC was one of the alleged conspirators and therefore is liable for the acts in furtherance of the conspiracy. On this issue the Court of Appeals reasons that "[b]ecause the individual defendants were properly dismissed from the action, Cross cannot show that these individuals through acts outside the scope of their employment, conspired with GMC to deprive him of his civil rights." Cross, supra, 470.

This stated position is contrary to basic conspiracy theory and to an express posture of this Court. Any one conspirator is jointly and severally liable for the acts of co-conspirators. A conspiracy is a partnership in crime and the act of one is the act of all. United States v. Sucony Vacuum Oil Co., 310 U.S. 150, 253-54, 60 S.Ct. 811, 858, 84 L.Ed. 1142 (1940). See also, Beltz Travel Service v. International Air

Transportation Association, 620 F.2d 1360 (9th Cir. 1980), and cases cited therein.

Hence, because the elements for alleging a conspiracy existed in the complaint, namely, (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States; See, Griffin v. Breckenridge, 403 U.S. 88, 102-103, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971), and because of the theory behind liability of co-conspirators, the doctrine of res judicata has been erroneously applied in this case here on review.

CONCLUSION

In conclusion, the issuance of the requested Writ of Certiorari is mandated by the improper use of the doctrine of res judicata to prevent a constitutional right to a trial on the merits. By not following the fundamental rules for the application of this doctrine of preclusion, the Court of Appeals has far departed from an accepted and usual course of judicial proceedings and it is error to do so.

Your petitioner respectfully request that Writ of Certiorari issue.

Respectfully Submitted

Danny Clark Cross, Esq.

APPENDIX

Table Of Contents:

OPINION,
United States Court Of Appeals
For The Eighth Circuit,
(Filed November 27th, 1985). . . .A1 to A10

DECISION,
United States Court Of Appeals
For The Eighth Circuit,
Concerning Petition For Rehearing
(Filed January 16th, 1986). A11

ORDER,
United States District Court,
Eastern District of Missouri
Eastern Division,
(Filed October 3rd, 1984). . . . A12 to A13

ORDER and MEMORANDUM
United States District Court,
Eastern District of Missouri
Eastern Division,
(Filed June 11th, 1981). . . . . A14 to A17

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2570

Danny Clark Cross,	*	
	*	
Appellant,	*	
	*	
v.	*	Appeal from the
	*	United States
General Mortors Corp.,	*	District Court
Robert Lemmon, Jerry	*	for the Eastern
Williams, Donald	*	District of
Weedmon, Jim Tisoto,	*	Missouri.
Mark Woodham, Vaughn	*	
Smith, Jerry Williams,	*	
H.E. Knight, Dr.	*	
Shanahan, Charles	*	
Seabough, J.H. Vincent	*	
Jay Boren, Charles	*	
Hagan, Jack Seifert,	*	
Mike Wisdom, Dwight	*	
Dugan, D.E. McGowan,	*	
Ray Stipes and Bob	*	
Brookhouse,	*	
	*	
Appellees.	*	

Submitted: October 14, 1985

Filed : November 27, 1985

Before HEANEY, Circuit Judge, Henly, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

HEANEY, Circuit Judge.

Danny Clark Cross, appeals pro se the district court's dismissal for failure to state a claim his 42 U.S.C. §§ 1981 and 1985(3) complaint against General Motors

Corporation (GMC) and several of its employees and/or agents. For reversal, Cross argues that the district court erred in ruling that the Missouri statute of limitations barred his suit and that his complaint failed to state a cause of action. We affirm.

I. FACTS.

On April 4, 1980, Cross filed a complaint (subsequently amended) which alleged that GMC and several of its agents had conspired to harass him and deprive him of employment because of his race. Specifically, Cross alleged that from 1968 until 1976, while he was employed at the GMC plant in St. Louis, Missouri, certain employees of GMC falsified his employment records, wrongfully denied him medical leave, threatened to lay him off, failed to compemsate him for work he was ordered to do but that was outside his job description, forced him to work while injured, administered raciallymotivated

beatings, laid him off out of normal seniority rank, increased his workload (while not increasing that of others), unnecessarily monitored his work habits and insulted him with racial epithets.

On December 18, 1980, the district court dismissed without prejudice the individual defendants because Cross failed to serve them with process, and the case proceeded with GMC as the sole defendant. The district court then dismissed without prejudice Cross's complaint against GMC for willful failure to comply with a discovery order, see Fed. R. Civ. P. 37(b). The court also dismissed, for failure to state a claim, Cross's conspiracy count under 42 U.S.C. § 1985(3). The district court, however, retained jurisdiction over the action in order to hold a hearing as to whether Cross would 1) be assessed costs, and 2) have his in forma pauperis status revoked.

Cross filed a timely appeal and, on June 16, 1982, this Court entered an order dismissing the appeal as interlocutory. On December 7, 1982, fees were assessed against Cross and, on April 16, 1983, the district court entered a final order revoking Cross's in forma pauperis status.

Cross appealed, Cross v. General Motors Corp., 721 F. 2d 1152 (8th Cir. 1983), and we affirmed the orders of the district court, without prejudice to Cross's ability to refile his action. With respect to our affirmance of the district court's dismissal of the section 1985(3) conspiracy claim, we noted that although "a corporation and its agents are a single person in the eyes of the law, and a corporation cannot conspire with itself* * * the case law does not completely foreclose the possibility of applying a § 1985(3) to a single corporation." 721 F. 2d at 1156. We stated that if Cross refiled his action, named

individual agents of the corporation, and proved that they acted outside the scope of their employment or for personal reasons, he might state a meritorious section 1985(3) claim. Id.

On April 25, 1984, before the one year anniversary of the final deposition of his case, Cross refiled his conspiracy claims under 42 U.S.C. § 1981 and section 1985(3). He named GMC and four of its agents as codenfendants and alleged that the agents conspired with GMC by taking took discriminatory actions against him which were outside the scope of their employment. Although we stated in Cross II, 721 F 2d at 1156, that the GMC agents' alleged were arguably within the scope of their employment, it is clear that the alleged physical batterings and racial epithets would be outside the scope of the agents' employment.

GMC and the individual defendants claimed that Cross's action against the

individuals was time barred by Mo. Rev. Stat. § 516.120 and the action against GMC was either a new action time barred by this same statute of limitations or it was the same action considered in Cross II and thus barred by res judicata.

The district court dismissed the action as time barred and barred by res judicata. Cross appeal again.

II. DISCUSSION.

Because there is no federal statute of limitations applicable to suits alleging violations of civil rights, the court must apply the one most appropriate state statute of limitations. Wilson v. Garcia, 85 L. Ed. 2d 254 (1985). In Wilson, the Court held that claims under 42 U.S.C. § 1983 are best characterized as personal injury actions for statute of limitations purposes. Although this Court has not yet had occasion to apply Wilson to claims under 42 U.S.C. §§ 1981 and 1985(3), we have applied Missouri's

five-year statute of limitations, Mo. Rev. Stat. § 516.120, for, inter alia, personal injury actions, to section 1981 action. Green v. McDonnell Douglas Corp., 463 F. 2d 337 (8th Cir. 1972), rev'd on other grounds, 411 U.S. 792 (1973). In Peterson v. Fink, 515 F. 2d 815 (8th Cir 1975), involving a section 1985(3) claim, however, we applied Missouri's three-year statute of limitations, Mo. Rev. Stat. § 516.130(1), for actions against "an officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office * * *." We need not decide whether, under Wilson, the three- or five-year statute of limitations applies here because even if we apply the longer five-year statute of limitations set forth in Mo. Rev. Stat. § 561.120 to both the section 1981 and 1985(3) claims, it is clear that Cross's present action against the individual

defendants was not commenced until well beyond five years after the termination of his employment with GMC and the acts which he alleges to have occurred in support of the alleged conspiracy between GMC and its agents.

The only question here is whether the five-year statute of limitations was tolled[1] by Mo. Rev. Stat. § 516.230, which gives a plaintiff one year to refile a complaint after he has suffered a nonsuit,[2] because Cross had filed an earlier action against the individual defendants which was dismissed for lack of jurisdiction. This statute is clearly

1. In Wilson, ___U.S. at ___, 105 S.Ct. at 1943 85 L.Ed.2d at 262, the Court held that state law governs not only the length of the limitations period, but also the related question of tolling and application.

2. The statute provides, in relevant part, "If any action shall have been commenced within the times respectively prescribed* * *and plaintiff therein suffer a nonsuit* * *such plaintiff may commence a new action from time to time, within one year after such nonsuit suffered* * *" Mo. Rev. Stat. § 516.230.

inapplicable to Cross's action against the individual defendants because he never suffered a nonsuit with respect to these defendants. See Mertens v. McMahon, 115 S.W. 2d 180 (Mo. App. 1938). His original and timely suit against these individuals was dismissed for lack of jurisdiction and " t hat cause having been dismissed without the court ever having acquired jurisdiction, the legal situation is the same as though that suit was never filed." Id. at 183 (Mo. App. 1938). Because Cross did not, under Missouri law, "file" a suit against the individual defendants until well after the five-year limitations period, his action against these individuals is timebarred.

Because the individual defendants were properly dismissed from this action, Cross cannot show that these individuals, through acts outside the scope of their employment, conspired with GMC to deprive

nim of his civil rights. We are left then with the identical conspiracy claims against GMC which were considered and rejected in Cross II. Accordingly, the district court properly dismissed his action against GMC as res judicata.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2570-EM	*	
	*	
	*	
Danny Clark Cross,	*	
	*	
Appellant,	*	
	*	Appeal from the
vs.	*	United States
	*	District Court
General Motors Corp., et al.,	*	for the Eastern
	*	District of
	*	Missouri.
Appellees.	*	

Appellant's petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

January 16, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 84-988C(5)
	)	
GENERAL MOTORS CORP., et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

IT IS HEREBY ORDERED that defendants' motion for summary judgement be and is GRANTED. This case nad been previously filed in Judge Hungate's Court and a final order of dismissal was entered on January 7, 1982. Plaintiff filed this complaint on April 25, 1984, over one year from that dismissal; therefore R.S. Mo. § 516.230 is inapplicable. Furthermore, plaintiff continues to fail to state a cause of action under 42 U.S.C. § 1985(3) because the defendants constitute a single person and therefore, there is no basis for a conspiracy. Domorawski v. Dowling, 459 F. 2d 190 (7th C 1972).

Although the complaint now names individual defendants, it states the same allegations as it did four years ago. The Eighth Circuit already ruled that plaintiff failed to state a claim for relief because the acts alleged were arguably within the scope of business. See, Cross v. General Motors Corp., 721 F. 1152, n.7 (8th C 1983).

Dated this 3rd day of October, 1984.

Stephen N. Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 80-0450C(4)
	)	
GENERAL MOTORS CORP.,	)	
	)	
Defendant.	)	

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY FURTHER ORDERED that defendant's motion for judgement on the pleadings be and the same is denied.

IT IS HEREBY FURTHER ORDERED that defendant's motion for partial summary judgement be and the same is denied.

Dated this 11th day of June, 1981

William L. Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 80-04500(4)
	)	
GENERAL MOTORS CORP.,	)	
	)	
Defendant.	)	

MEMORANDUM

This matter is before the Court on defendant's motion for judgement on the pleadings, or in the alternative for partial summary judgement. For reasons stated below, defendant's motions will be denied.

Plaintiff brings this action, under 42 U.S.C. §§ 1981 and 1985(c), alleging that the defendant employer discriminated against him because of his race.

Defendant moves for judgement on the pleadings as to all incidents not alleged in plaintiff's complaint which occurred before April 4, 1975. Defendant

relies on the applicable Missouri limitations period for bringing a § 1981 action (five years) and asserts that no facts, incidents, or parties are pleaded of any events earlier than June 18, 1975.

Plaintiff's pleadings allege that defendant violated his employment rights from Septemeber 19, 1968, until August 13, 1976. The Court, having reviewed the record, finds a sufficient showing that plaintiff's allegations may include a continuous violation, and thus are not barred by the statute of limitations. See Allen v. Amalgamated Transit Union Local 788, 554 F. 2d 876 (8th Cir. 1977).

Therefore, defendant's motion for judgement on the pleadings will be denied.

In the alternative, defendant moves the Court to enter partial summary judgement upon plaintiff's second amended complaint, based on the absence of

genuine issues as to any material fact.

Finding genuine issues of material fact relating to the alleged incidents contributing to plaintiff's claim that defendant acted in violation of 42 U.S.C. § 1981 , partial summary judgement will be denied.

Dated this 11th day of June, 1981.

William L. Hungate
UNITED STATES DISTRICT JUDGE